U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 27Dec2001

Case No: 1999-BLA-1086
BRB No.: 00-1112 BLA

In the Matter of

CLAUDE VANDYKE,
Claimant

v.

VANDYKE BROTHERS COAL COMPANY, Inc.,
Employer,

ROCKWOOD INSURANCE COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Susan D. Oglebay, Esquire
For the claimant

H. Ashby Dickerson, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER ON REMAND — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are

awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On August 23, 2001, this case was remanded to the Office of Administrative Law Judges for a formal decision. The parties had full opportunity to submit briefs upon remand of the case.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUE[1]

The following issue remains for resolution:

1. whether the miner has pneumoconiosis as defined by the Act and regulations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

[1]Upon appeal, the Benefits Review Board affirmed my findings that the claimant is totally disabled by a respiratory or pulmonary impairment, and that the weight of the chest x-ray evidence and CT scan readings do not support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §§ 718.2020(a)(1), (a)(4).

The claimant, Claude Vandyke, is currently seventy-seven years old and has a seventh grade education. He has one dependent, his wife, for purposes of augmentation of benefits. (DX 1, 7, 8).

The claimant filed his first claim for benefits under the Act on August 23, 1971 with the Social Security Administration ("SSA"). By letter dated September 13, 1973, SSA denied his claim after a review under the 1972 amendments to the Act. SSA also denied the claim after reconsideration on June 6, 1974. Both SSA and the Department of Labor ("DOL") reviewed the claim under the 1977 amendments to the Act and denied benefits. The first claim was finally denied on February 29, 1980. (DX 27).

The claimant filed a second claim for benefits with DOL on September 13, 1983. The claim was denied on August 3, 1984, and claimant took no further action. (DX 27A).

A third claim was filed with the Department of Labor on January 22, 1986. On May 22, 1986, that claim was also denied. Again, the claimant took no further action. (DX 27B).

The instant claim was filed on August 6, 1987. A formal hearing was held before Administrative Law Judge Nicodemo De Gregorio on May 21, 1991. (DX 67). In a Decision and Order dated January 15, 1992, Judge De Gregorio awarded benefits. As more than one year had passed since the denial of the claimant's previous claim, the instant claim was treated as a duplicate claim pursuant to §725.309(d). Judge De Gregorio found that a material change in conditions had occurred since the denial of the previous claim in 1986 as the record contained evidence that was developed subsequent to the previous denial which could possibly, if fully credited, change the prior administrative result. Judge De Gregorio went on to consider the merits of the case and found that the combination of positive x-rays and medical opinions diagnosing pneumoconiosis established by a preponderance of the evidence that the claimant suffered from pneumoconiosis. He also found that since the claimant had more than ten years of coal mine employment, he was entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. § 718.203(b). Judge De Gregorio found that, based on all of the evidence relating to total disability, the claimant was totally disabled by a respiratory or a pulmonary impairment from performing his previous coal mining job as cutting machine helper. He specifically cited the opinions of Drs. Buddington and Endres-Bercher and the arterial blood gas studies. Finally, Judge De Gregorio found that the claimant established his burden of proving that his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. Having found that the claimant proved all the elements of his claim, Judge De Gregorio found that the claimant was entitled to benefits from August 1987. (DX 70).

The employer appealed that decision to the Benefits Review Board ("the Board"), which initially affirmed the award on August 25, 1993. (DX 72, 77). However, on reconsideration on October 24, 1995, the Board vacated Judge De Gregorio's finding that the claimant established

a material change in conditions. The Board explained that subsequent to the issuance of its Decision and Order of August 25, 1993, the United States Court of Appeals for the Fourth Circuit decided the case of *Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). The Board thus remanded the case for Judge De Gregorio to determine if the claimant established a material change in conditions in light of *Lisa Lee Mines, supra*. The Board also held that if Judge De Gregorio found that the claimant had established a material change in conditions, the award of benefits would be affirmed. (DX 79).

In a Decision and Order on Remand dated July 29, 1996, Judge De Gregorio concluded that the claimant had established a material change in conditions within the meaning of § 725.309 (d). Judge DeGregorio reiterated his finding that the claimant established a totally disabling respiratory impairment based on the opinions of Drs. Buddington and Endres-Bercher. He stated that since total disability was one of the elements that was previously adjudicated against the claimant, and that since total disability had been established by medical evidence submitted after the prior denial, the claimant established a material change in conditions in accordance with *Lisa Lee Mines, supra*, as revised upon rehearing by the Fourth Circuit Court on June 19, 1996 (en banc). (DX 80).

The employer appealed Judge De Gregorio's decision, arguing that the judge erred in making his material change in conditions finding by failing to consider all the probative medical evidence submitted after the prior denial. The Board agreed, and in a Decision and Order dated August 5, 1997, the Board vacated Judge De Gregorio's § 725.309(d) finding and remanded the case for consideration of all the probative evidence submitted after the previous denial, *i.e.*, the opinions of Drs. Endres-Bercher, Buddington, Garcia, and Fino, and the pulmonary function and blood gas studies, and for provision of an adequate rationale for crediting or discrediting the evidence. The employer also argued that Judge De Gregorio erred in finding Dr. Endres-Bercher's opinion sufficient to establish total respiratory disability without considering the exertional requirements of the claimant's last coal mine employment. The Board noted that in its first Decision and Order, it held that Judge De Gregorio properly compared the exertional requirements of the claimant's last coal mine employment with Dr. Endres-Bercher's assessment of disability and properly concluded that the opinion established a totally disabling respiratory impairment. As the employer did not advance any new arguments in support of altering the Board's previous holding and set forth no exception to the law-of-the-case doctrine, the Board adhered to its previous affirmance of Judge De Gregorio's findings regarding Dr. Endres-Bercher's opinion. (DX 81, 82, 83).

In an Order dated November 24, 1997, Associate Chief Judge Thomas M. Burke informed the parties that as Judge De Gregorio was no longer with this Office, the matter would be transferred to another administrative law judge for a decision on the record. The case was thus assigned to Administrative Law Judge Clement J. Kichuk.

On April 8, 1998, Judge Kichuk issued a Decision and Order On Remand - Denying Benefits. Weighing the evidence submitted with the duplicate claim, he found that the claimant had not established either pneumoconiosis or total disability. As such, he found that a material change in conditions had not been established, and benefits were denied. (DX 85). The claimant appealed that denial to the Board. (DX 86).

While the claimant's appeal was still before the Board, the claimant filed a timely request for modification on September 14, 1998, pursuant to § 725.310. (DX 87, 90). The District Director, Office of Workers' Compensation Programs ("OWCP") denied the request on January 13, 1999. (DX 94). The claimant timely requested a formal hearing, and the case was referred to the Office of Administrative Law Judges on June 25, 1999. (DX 95, 96, 98, 99).

On July 28, 2000, I issued a Decision and Order denying benefits to the claimant, finding that, while Claimant had demonstrated a change in conditions via the employer's stipulation to Claimant's total disability, the claimant failed to demonstrate, by a preponderance of the evidence, that he suffered from pneumoconiosis. On August 19, 2000, Claimant appealed, and, upon review, the Board affirmed in part and vacated in part my previous decision in an August 23, 2001 opinion. The Board instructed that, upon remand, the administrative law judge was to revisit his assessment of the biopsy evidence as part of the claimant's proof of pneumoconiosis.

Medical Evidence

The following is a recitation of the relevant evidence to be considered upon this remand. The previously submitted evidence is summarized in Judge De Gregorio's Decision and Order Granting Benefits of January 15, 1992 and Judge Kichuk's Decision and Order on Remand - Denying Benefits of April 8, 1998. (DX 70, 85).

Biopsy Evidence

A biopsy of the left lung was obtained on October 15, 1999 under the direction of Dr. J.W. Denton. Dr. David R. Hudgens, board-certified in anatomic and clinical pathology, reviewed the tissue and diagnosed "features consistent with simple coal workers pneumoconiosis." His microscopic description was that "[t]he alveolar walls are thin and free of significant inflammation or fibrosis. The interlobular septa, peribronchial connective tissue, and subpleural connective tissue show mild fibrosis and a moderate degree of deposition of black pigment. There is focal emphysematous change." Another pathologist, Dr. R.S. Buddington, board-certified in anatomic and clinical pathology, noted on the same report that the diagnosis was "[f]ibrosis and anthracosis."

Dr. Joseph F. Tomashefski, Jr., reviewed the biopsy slides and medical records on behalf of the employer and issued a report on January 21, 2000. He diagnosed diffuse panacinar emphysema. He stated that:

> Within reasonable medical certainty, based on the absence of coal macules, he does not have coal workers' pneumoconiosis. The black pigment seen in his lung biopsy represents coal dust exposure only. It is also my opinion, that Mr. Vandyke does not have significant interstitial fibrosis. The interstitial changes reported on Mr. Vandyke's chest x-rays and CT scans, probably represent pleural and interlobular septal fibrosis in association with focal atelectasis. Interlobular septal fibrosis is a non-specific feature, which, in Mr. Vandyke's case, is probably a secondary reaction to pleural fibrosis and chronic atelectasis. It is my opinion, within reasonable medical certainty, that fibrosis of interlobular septa and pleural fibrosis, as seen in the Vandyke's lung biopsy, are not caused by coal dust exposure.

Dr. Tomashefski is board-certified in anatomic and clinical pathology. (EX 31).

Dr. Erika C. Crouch, who is board-certified in anatomic pathology, reviewed the four biopsy slides along with Dr. Hudgens' report. She diagnosed emphysema, predominant panacinar; chronic bronchiolitis; non-specific remodeling of pulmonary arteries; and no evidence of coal workers' pneumoconiosis. She commented that:

> Although there is histologic evidence of coal dust accumulation in the lung, no diagnostic coal dust macules are identified, and no coal dust micronodules, nodules or areas of massive fibrosis or silicotic nodules are observed. There is histologic evidence [of] panacinar emphysema, and some small airway profiles show irregular luminal contours with variable mural fibrosis and patchy infiltrates of chronic inflammatory cells consistent with a chronic bronchiolitis. Although the changes are non-specific there is no evidence to suggest that they are any way related to coal dust deposition.

(EX 38).

DISCUSSION AND APPLICABLE LAW

Because Claude Vandyke filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and

that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Under the Act, "'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Only one section is in question upon remand.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. Diagnoses of pulmonary anthracosis have been held to be the equivalent of a diagnosis of pneumoconiosis. *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536 (11th Cir. 1993) (diagnosis of anthracosis is sufficient to establish pneumoconiosis); *Bueno v. Director, OWCP*, 7 B.L.R. 1-337 (1984); *Smith v. Island Creek Coal Co.*, 2 B.L.R. 1-1178 (1980); *Luketich v. Bethlehem Mines Corp.*, 2 B.L.R. 1-393 (1979). The Sixth Circuit held that the administrative law judge must also consider biopsy evidence which indicates the presence of anthracotic pigment. *Lykins v. Director, OWCP*, 819 F.2d 146 (6th Cir. 1987). However, in *Griffith v. Director, OWCP*, 49 F.3d 184 (6th Cir. 1995), the Sixth Circuit held that a finding of pigmentation described as "yellow-black consistent with coal pigment" was insufficient to support a finding of pneumoconiosis. In *Hapney v. Peabody Coal Co.*, 22 B.L.R. 1-___ (2001)(en banc), the Board addressed a diagnosis of anthracosis under the amended regulations. Specifically, the Board noted that 20 C.F.R. § 718.202(a)(2) (2000) contained an amendment to the prior version of the regulation "to add that a finding on autopsy or biopsy of anthracotic pigmentation shall not be sufficient, by itself, to establish the existence of pneumoconiosis." On the other hand, the Board agreed with the administrative law judge that a diagnosis of anthracosis on biopsy or autopsy fell within the definition of pneumoconiosis at 20 C.F.R. § 717.201(a)(1) (2000).

Drs. Hudgens and Buddington opined on a one-page biopsy report. (CX 1). Dr. Buddington's opinion, signaled only by his initials, was limited to a frozen section diagnosis of "[f]ibrosis and anthracosis." Dr. Buddington is not credited with any other material on the report, and there is no supporting data or statements demonstrating the rationale producing Dr. Buddington's assessment of fibrosis and anthracosis. However, "anthracosis" is a term included within the regulatory definition of pneumoconiosis. *See* 20 C.F.R. §718.201(a). Thus, when present in the miner, anthracosis satisfies the definition of pneumoconiosis. *See Clinchfield Coal Co. v. Fuller*, 830 F.3d 622, 625 (4th Cir. 1999). Dr. Buddington's diagnosis of anthracosis, accordingly, is a diagnosis of pneumoconiosis as defined by the applicable regulations. I accord his opinion less weight, however, due to the fact that it is neither well reasoned nor well documented. In weighing medical opinions, the Fourth Circuit Court of Appeals has stated that the

following factors shall be considered relevant: the qualification of the physician, the explanation of conclusions, the documentation underlying the physician's medical judgment, the sophistication of the diagnosis, and the bases of the diagnosis. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997). As Dr. Buddington's opinion consists of three words, it per se cannot demonstrate an acceptable explanation of conclusions, documentation of underlying medical judgment, sophistication of diagnosis, or the bases of diagnosis. Likewise, Dr. Buddington's opinion does not satisfy the Board's announced standards for "well documented" or "well reasoned." *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Therefore, I accord Dr. Buddington's opinion little weight.

Dr. Hudgens's opinion comprises the remainder of the biopsy report. (CX 1). Dr. Hudgens also diagnosed "anthracosis" and his final diagnosis was "features consistent with simple coal workers pneumoconiosis." While Dr. Hudgens's opinion appears to prevaricate when he diagnoses features *consistent* with pneumoconiosis, I find that Dr. Hudgens diagnosed pneumoconiosis, as his final conclusion intimated findings consistent with pneumoconiosis and he also cited anthracosis in his gross description of the specimen. As anthracosis satisfies the definition of pneumoconiosis, the doctor's opinion is probative evidence of the existence of pneumoconiosis in the claimant. I accord the doctor's opinion less probative weight, however, as the opinion does not fully and thoroughly document and explain the criteria for the doctor's conclusion. In fact, there is no explanation of the conclusion. While the opinion does document the bases upon which the doctor seemingly relied, as directed by *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438 (4th Cir. 1997), the opinion does not document Dr. Hudgens's reasoning from the observed data to his conclusions. Thus, I accord the opinion less probative weight.

Dr. Tomashefski's review of the biopsy slides is thorough and well-reasoned. (EX 31). The doctor did not diagnose pneumoconiosis, and he thoroughly explained, with supporting documentation, his medical reasoning. I accord Dr. Tomashefski's opinion probative weight on the existence of pneumoconiosis.

Similarly, I accord Dr. Crouch's opinion probative weight on the issue of the existence of pneumoconiosis. Her medical opinion was well-documented and well-reasoned. Dr. Crouch's opinion was clear that she did not diagnose pneumoconiosis and could not affirmatively attribute any of the results examined in the biopsy to coal dust exposure.

Each of the doctors opining over the biopsy results is board-certified in anatomic and clinical pathology. The determination of pneumoconiosis, thus, is not a battle of credentials. Rather, and appropriately, I find that the claimant has failed to demonstrate pneumoconiosis through the biopsy evidence of record because I grant more probative weight to the two reports finding no pneumoconiosis. Both reports concluding no pneumoconiosis are better reasoned and better

documented. Both reports finding pneumoconiosis suffer from a dearth of reasoning and documentation. The weight I assign the reports of Drs. Tomashefski and Crouch far outweigh the probative weight I grant to the opinions of Drs. Buddington and Hudgens. Accordingly, I find that Claimant has failed to prove the existence of pneumoconiosis via the biopsy evidence of record.

In determining the existence of pneumoconiosis, the Fourth Circuit Court of Appeals has held that all evidence under § 718.202(a) must be weighed together to determine whether pneumoconiosis is present. This is in contrast to the holdings of the Board that have held that pneumoconiosis may be established by operation of presumption or by a preponderance of the evidence at any one of the individual subsections at § 718.202(a)(1) through (a)(4). *See Jones v. Badger Coal Co.*, 21 B.L.R. 1-103 (1998) (en banc). Because the instant case arises in the Fourth Circuit, I must consider all of the claimant's evidence regarding the existence of pneumoconiosis together. As stated above, the Board affirmed as unchallenged my previous determination concerning the claimant's chest x-ray evidence and CT scan readings. As my ultimate weighing of the biopsy evidence has not changed on remand of the instant case and my prior determinations regarding Claimant's remaining evidence of pneumoconiosis have been affirmed, I again find that the claimant has failed to demonstrate the existence of pneumoconiosis.

Conclusion

In sum, the evidence does not establish the existence of pneumoconiosis. Accordingly, the claim of Claude Vandyke must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Claude Vandyke for benefits under the Act is denied.

A
JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2605, Washington, D.C. 20210.